United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

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75-4003

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -

JUNE TERM

Docket 75-4003

- -

LUIS WALTERS-VALDEZ,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

- -

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

PETITIONER'S BRIEF

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TABLE OF CONTENTS

	Page No.
Statement of the Issue	1
Statement of the Case	1
Statement of the Facts	2, 3
ARGUMENT:	
The Immigration Service unreasonably searched and seized the petitioner without warrant, without consent, and without probable cause, and the evidence obtained as the result cannot be used.	3-6
Conclusion	7

CASES CITED

Abel v. U.S., 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. 2d, 668 (1960)	3
Almeida-Sanchez v. U.S., 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973)	5
Diogo v. Holland, 243 F. 2d 571, (3d Cir. 1957)	3
Draper v. U.S. (1959), 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329	4
Klissas v. INS, 361 F. 2d 529 (D. C. Cir. 1966)	5
Lau v. INS, 445 F. 2d 217 (D. C. Cir. 1971), cert. den. 404 U. S. 864 (1971)	4
Martinez-Angosto v. Mason, 344 F. 2d 673 (2d Cir. 1965)	3
Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)	5
Weeks v. U. S. (1914), 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652	6

STATUTES CITED

	Page No.
Immigration & Nationality Act, 66 Stat. 163 (1952), as amended:	
Section 287 (a)(2) and (4), 8 U.S.C. 1357 (a)(2) and (4)	3,5

REGULATIONS CITED

Code of Federal Regulations (C.F.R.):	
8 C.F.R. 242.2(a)	5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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June Term 1975

Docket No. 75-4003

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LUIS WALTERS-VALDEZ,

Petitioner,

-v-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

- -

PETITIONER'S BRIEF

Statement of the Issue

Whether the Immigration Service unreasonably searched and seized the petitioner without warrant, without consent, and without probable cause, and if the evidence obtained as a result cannot be used.

Statement of the Case

Pursuant to Section 106(a) of the Immigration & Nationality Act, 8 U.S.C. Sec. 1105(a), petitioner petitions this Court for review of a final order of deportation entered against him by the Board of Immigration Appeals on December 18, 1974. That order dismissed the petitioner's appeal from an order of a Special Inquiry Officer finding him deportable and denying him voluntary departure.

Statement of the Facts

The petitioner is a married male alien, a native and citizen of Chile. He last entered the United States on or about January 22, 1972, as a non-immigrant visitor for pleasure authorized to remain in that status until February 25, 1972. The petitioner failed to depart and has remained in the United States longer than authorized. He admitted the truth of the factual allegations in the Order to Show Cause but refused to concede deportability. His counsel argued that (1) there was a lack of reasonable or probable cause to arrest the petitioner without a warrant; and (2) since there was an illegal arrest, search and seizure, not only should all evidence acquired thereby be suppressed, but that the entire proceedings should be deemed a nullity as the "fruit of the poisoned tree."

The Service learned from the petitioner's wife, who was an untested informer who had been prevented from being smuggled into the United States from Canada, that the petitioner was an alien and was awaiting her arrival at a hotel in Buffalo, New York. Petitioner's wife's evidence prior to his arrest was not verified. As a result of this information the Service went to petitioner's hotel at ten minutes to one in the morning to arrest him, without first obtaining a warrant. They entered his hotel room without his consent and without identifying themselves, arrested and searched him.

The Immigration Judge denied petitioner's motion to suppress the evidence and denied an application for voluntary departure. The Board of

Immigration Appeals dismissed the appeal.

ARGUMENT

THE IMMIGRATION SERVICE UNREASONABLY SEARCHED AND SEIZED THE PETITIONER WITHOUT WARRANT, WITHOUT CONSENT AND WITHOUT PROBABLE CAUSE AND THE EVIDENCE OBTAINED AS THE RESULT CANNOT BE USED.

When the Service learned from the petitioner's wife, who had been prevented from being smuggled into the United States from Canada, that the petitioner was an alien and was awaiting her arrival at a hotel in Buffalo, New York, the Service proceeded to his hotel and arrested him without procuring a warrant although it had ample time to do so. Since the petitioner did not know that his wife was apprehended, the Service had no reasonable basis to believe it was an urgent situation.

The Service maintains that it had reasonable or probable cause because of the information supplied it by petitioner's wife. This was, of course, an untested informer. The Service justifies its action based on Section 287(a)(2) and (4), Act of 1952, 8 U.S.C. 1357 (a)(2) and (4), that an alien is believed to be in the United States in violation of law and the Service has reason to believe that the alien is likely to escape. If the Service's belief that the alien would flee before obtaining a warrant is unreasonable, the arrest may be unjustified. Diogo v. Holland, 243 F. 2d, 571 (3rd Cir. 1957). Martinez-Angosto v. Mason, 344 F. 2d 673 (2d Cir. 1965).

Authority in Immigration law to issue warrants is lodged with the district director, acting district director, deputy district director, assistant district director for investigations or the officer in charge at designated major suboffices. 8 C.F.R. 242.2(a). Abel v. U.S., 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d, 668 (1960).

The Immigration officers had no justification to proceed without a warrant. They possessed only information from an untested informer whose testimony was not corroborated to an extent sufficient to establish her credibility before the arrest. Draper v. U.S., 358 U.S. 307 (1959).

When the officers went to petitioner's hotel room, they went at ten to one in the morning while he was asleep. They entered his room without his consent. While he was putting on his pants they put him against the wall and searched him without permission. Then they handcuffed him and took him to Immigration. At no time before they handcuffed him did the arresting officers identify themselves or state why they were detaining or arresting the petitioner.

The reasonableness of the officers' actions must be judged in light of the time they had to obtain a warrant and the unlikelihood at ten to one in the morning while petitioner was probably asleep to expect him to flee. The basis of the Fourth Amendment's strictures that a man be secure in his home and person were here violated in letter and spirit. The basic constitutional tenet that a magistrate should be placed between the constitutional guarantees of individual liberties and the zealous officer of the Service was here violated. The interrogation that ensued was no interrogation; it was peremptory arrest and interrogation after the fact because when the officers entered the hotel room, the petitioner was no longer at liberty. An interrogation or detention which exceeds the bounds of reasonableness violates the Fourth Amendment and any resulting evidence may be inadmissible. Lau v. INS, 445 F. 2d 217 (D. C. Cir. 1971), cert. den. 404 U.S. 864 (1971).

The Fourth Amendment's prohibition against unreasonable searches and seizures applies in deportation proceedings, and evidence obtained as the result of an unlawful search and seizure cannot be used. Klissas v. INS, 361 F. 2d 529 (D. C. Cir. 1966). In the case at bar the petitioner made no voluntary admissions at the deportation hearing. Everything conceded was on the basis that although the facts were true in the Order to Show Cause, their legal weight was a nullity because the evidence had been obtained through illegal search and seizure.

The Service did not carry its burden of proof that the petitioner consented to a search. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

The warrant of arrest explains the contents of the Order to Show Cause to the alien. He is warned he has a right to remain silent and to retain counsel and that any statement he makes may be used against him. He is informed of the determination concerning his custody and of his right to appeal from such a determination. 8 C.F.R. 242.2(a). In disregarding these requirements the Service was acting in contempt of law. The only way to redress such wrongs is traditionally to suppress the evidence resulting from such unlawful conduct.

In 1973 the Supreme Court held in a warrantless search of an automobile stopped by the U. S. border patrol that they were required to have a warrant of arrest or probable cause or reasonable suspicion in order to conduct a search. Almeida-Sanchez v. U.S., 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d, 596 (1973). Despite Sec. 287(a) of the Immigration & Nation-

ality Act, 8 U.S.C/ Sec. 1357(a) permitting warrantless searches of automobiles "within a reasonable distance from any external boundary of the U. S.", the Court stated that Sec. 287(a) does not declare a field day for the government in searching autos. The Court insisted upon probable cause as a minimum requirement. Granting that the Federal Government have the power to exclude aliens and inspect and search individuals or conveyances at the border and conceding the Government's contention that the unlawful entry of aliens is a serious problem, the Court held nonetheless that the search violated the Fourth Amendment.

Prior to the arrest of this petitioner, there was only an unverified statement of an untested informer. The Service having ample time to obtain a warrant failed to do so. Service officers entered the petitioner's hotel room late at night and arrested him before identifying themselves or getting his consent to enter. The search the officers made was not incident to a lawful arrest and there was no proof showing that there was any emergency justifying the dispensing with the requirement of a warrant. At the deportation hearing the evidence of the Immigration Service was objected to by the petitioner as having been the "fruit of the poisoned tree", viz., his evidence was obtained as a result of his unlawful arrest. Since the arrest and search were without warrant and without probable cause, the evidence should have been suppressed. Since 1914 the Supreme Court has held as a rule of constitutional law that the fruits of an unreasonable search and seizure must be suppressed in federal courts. Weeks v. U.S. (1914), 232 U.S. 383.

Conclusion

The decision of the Board of Immigration Appeals should be reversed and the deportation proceedings dismissed and terminated.

Respectfully submitted,

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Curran (R.L.)

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ES ATTORNEY